

Matter of Doorley v Kelly
2011 NY Slip Op 31476(U)
June 3, 2011
Supreme Court, New York County
Docket Number: 114925/10
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.

PART 52

Justice

DOORLEY, AIDAN

INDEX NO. 114925/10

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

KELLY, RAYMOND

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/3/11

CSK
CYNTHIA S. KERN
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
In the Matter of the Application of

AIDAN DOORLEY,

Petitioner,

Index No. 114925/10

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

RAYMOND KELLY, as the Police Commissioner of
the CITY of New York, and as Chairman of the Board
of Trustees of the Police Pension fund, Article II and
THE BOARD OF TRUSTEES of the Police Pension
Fund, Article II, NEW YORK CITY POLICE
DEPARTMENT,

Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner Aidan Doorley brought this petition pursuant to Article 78 of the Civil Practice
Law and Rules ("CPLR") seeking to vacate and annul a determination made by respondents
denying petitioner accidental disability retirement ("ADR"). For the reasons set forth below, the
petition is hereby dismissed.

The relevant facts are as follows. On August 30, 1993, petitioner was appointed to the

uniformed force of the NYPD and became a member of the Police Pension Fund ("PPF"). On June 7, 2004, while on duty, petitioner was struck with a metal rod and sustained injury to his right eye, neck and back (the "LOD incident"). In January 2007, petitioner submitted an ADR application concerning his psychological condition and the Police Commissioner submitted a related ordinary disability retirement ("ODR") application on his behalf. In his ADR application concerning his psychological condition, petitioner described the nature of his disability as follows: "I complain of a psychological condition which causes me depression, loss of sleep, and anxiety attacks. As a result I am unable to perform police duty." Additionally, on March 6, 2007, Melissa Bochicchio, Psy.D., a NYPD Psychologist I, interviewed petitioner and diagnosed him with Unidfferentiated Somatoform Disorder, Major Depressive Disorder, Recurrent, Moderate and Anxiety Disorder NOS. Dr. Bochicchio felt that petitioner was not psychologically fit for full duty and recommended that an application for disability retirement be filed on his behalf. Arthur Knour, Ph.D., the Director of the NYPD Psychological Evaluation Section, reviewed petitioner's file and agreed with Dr. Bochicchio's recommendation.

On June 11, 2007, the Medical Board considered petitioner's ADR application concerning his psychological condition as well as the Police Commissioner's related ODR application and, based upon its review of the documentary and physical evidence, determined that "there are significant psychological findings precluding [petitioner] from performing the full duties of a New York City Police Officer." Therefore, the Medical Board unanimously recommended approval of the Police Commissioner's ODR application and denial of petitioner's ADR application. On October 10, 2007, the Board of Trustees reviewed petitioner's application and remanded it back to the Medical Board to review new evidence. This evidence consisted of

a letter from petitioner's psychologists, C. Edward Robins, Ph.D and Erica M. Rivera, Psy.D. in which they stated that petitioner suffers from trauma-induced depressive disorder. On December 17, 2007, the Medical Board again considered petitioner's ADR application concerning his psychological condition and the Police Commissioner's related ODR application and, based on a review of all the medical evidence and an interview of petitioner, unanimously recommended approval of the Police Commissioner's ODR application and denial of petitioner's ADR application. On February 13, 2008, the Board of Trustees reviewed petitioner's case for the second time and remanded it back to the Medical Board for further consideration.

On March 24, 2008, the Medical Board again considered petitioner's ADR application concerning his psychological condition and the Police Commissioner's related ODR application, and again concluded that "there are significant psychological findings precluding [petitioner] from performing the full duties of a New York City Police Officer." Therefore, the Medical Board unanimously recommended approval of the Police Commissioner's ODR application and denial of petitioner's ADR application.

On or about August 12, 2008, petitioner's attorney sent a letter to Christopher McGrath, Esq., a representative from the Patrolmen's Benevolent Association ("PBA") requesting that petitioner's ADR application concerning his alleged psychological condition be remanded back to the Medical Board for review of new evidence. Petitioner's attorney attached to his letter a letter and treatment update from Dr. Robins, dated August 11, 2008, as well as the report prepared by Dr. Bochicchio, dated March 6, 2007. On August 13, 2008, the Board of Trustees reviewed petitioner's ADR application concerning his psychological condition for the third time. Mr. McGrath informed the Board of Trustees of petitioner's request that his ADR application

concerning his psychological condition be remanded back to the Medical Board to consider the new evidence. However, the Board of Trustees denied petitioner's request for a remand to the Medical Board because the submissions did not constitute new evidence as the Board of Trustees found that the reports were identical to reports they had already reviewed. Thus, the Board of Trustees voted 6/6 to adopt the Medical Board's recommendation denying petitioner's application for ADR and approving the Police Commissioner's application for ODR.

On or about December 11, 2008, petitioner commenced an Article 78 proceeding under Index No. 116545/2008 challenging the August 2008 denial of his ADR application concerning his psychological condition. In a Decision dated October 16, 2009, the Honorable Joan A. Madden remanded petitioner's application back to the Board of Trustees for further consideration. In her decision, Justice Madden required the Medical Board to address issues of causation, specifically, identifying and explaining the medical evidence that supported its conclusions, identifying any inconsistencies in the medical evidence and specifically addressing the medical evidence that supported petitioner's contention that he was entitled to ADR.

On or about January 13, 2010, the Board of Trustees remanded petitioner's case to the Medical Board based on Justice Madden's decision. On March 11, 2010, Drs. Robbins and Rivera, petitioner's treating therapists, issued a report relating petitioner's psychological symptoms which "hinder his ability to function and work in any setting" to the June 7, 2004 LOD incident. The next day, petitioner's attorney yet again requested that the Medical Board reconsider petitioner's ADR application concerning his psychological condition and consider the March 11, 2010 report from petitioner's doctors.

On March 15, 2010, in response to the Board of Trustees' remand, the Medical Board

reaffirmed granting petitioner ODR diagnosing him with a depressive disorder. The Medical Board interviewed petitioner and acknowledged that “after a full review of the material presented...there is no documentation of any trauma that could have caused this disability other than the 2004 LOD injury which had previously been reviewed by the Article II Medical Board.” However, in determining that petitioner’s disabling depressive disorder was not caused by the 2004 LOD incident, the Medical Board noted that “there is no appreciable pathologic or physiologic basis” for “[petitioner’s] persistent somatic symptoms, which have been unrelieved for approximately 5 years...”

On July 14, 2010, the Board of Trustees once again voted 6/6 to adopt the Medical Board’s recommendation denying petitioner’s application for ADR and approving the Police Commissioner’s application for ODR. Thereafter, petitioner commenced this Article 78 proceeding with the filing of the Verified Petition on November 16, 2010.

On review of an Article 78 petition, “[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious.” *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep’t 1982). “In applying the ‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis.” *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep’t 2005); *see Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)(“[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.”) “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.’ Arbitrary action is

without sound basis in reason and is generally taken without regard to facts.” *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the court finds that respondents’ determination to deny petitioner’s application for ADR was made on a rational basis. Admin. Code § 13-252, which governs retirement for accident disability for members of the PPF, provides as follows:

Retirement for accident disability.

Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his or her behalf in connection therewith shall be made upon the application of the commissioner, or upon the application of a member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired. If such medical examination and investigation shows that such member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith.

Admin. Code § 13-251, which governs retirement for ordinary disability for members of the PPF, provides as follows:

Retirement for ordinary disability.

Medical examination of a member in city-service for ordinary disability shall be made upon the application of the commissioner, or upon the application of such member or of a person acting in his or her behalf, stating that such a member is physically or mentally

incapacitated for the performance of duty and ought to be retired. If such medical examination shows that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, the medical board shall so report and the board shall retire such member for ordinary disability not less than thirty nor more than ninety days after the execution and filing of application therefor with the pension fund.

Where a police officer has applied for ADR, he must show that he is “a member in city-service” who is “physically incapacitated for the performance of city-service, as a natural and proximate result” of an accidental injury received in such city-service. N.Y.C. Admin. Code § 13-252. The applicant has the burden of proving to the Medical Board such incapacity and its causation. *See Evans v. City of New York*, 145 A.D.2d 361 (1st Dept 1988); *Christian v. New York City Employees’ Ret. Sys.*, 83 A.D.2d 507, 509 (1st Dept 1981), *aff’d*, 56 N.Y.2d 841 (1982). Therefore, in the absence of a finding of causation, a police officer certified by the Medical Board as physically or mentally incapacitated for the performance of police duties may be retired by the Board of Trustees on an ODR pension under Admin. Code § 13-251.

There are two stages in the Medical Board’s fact-finding process: (1) the “threshold matter” of determining “whether the applicant is actually ‘physically or mentally incapacitated for the performance of city-service;’” and (2) the “recommendation to the Board of Trustees as to whether the disability was ‘a natural and proximate result of an accidental injury received in such city-service.’” *Borenstein v. New York City Employees’ Ret. Sys.*, 88 N.Y.2d 756 (1996). Furthermore, the Medical Board’s determination must be sustained as long as it is supported by “some credible evidence.” *Id* at 761; *see also Meyer v. Bd. of Trs. Of the New York City Fire Dep’t, Article 1-B Pension Fund*, 90 N.Y.2d 139 (1997). Once the Medical Board make its determination, it must then make a recommendation to the Board of Trustees which has the

ultimate authority to determine causation. *See Meyer*, 90 N.Y.2d 145. A reviewing court may not set aside the Board of Trustees' denial of ADR unless "it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service related accident." *Id* at 145. Further, "[i]t is neither arbitrary nor capricious for the Board of Trustees to rely upon the Medical Board's conclusion that a disability is not causally connected to an individual's line of duty injuries," where the recommendation of the Medical Board is based on credible medical evidence. *Id* at 146.

The Medical Board rationally determined after analyzing the above statutory factors and reviewing petitioner's medical records that petitioner is mentally incapacitated as he suffers from depressive disorder and found him disabled from performing police duty. However, the Medical Board found that petitioner's mental disability was not the natural and proximate result of the June 2004 LOD incident and thus ADR was inappropriate. In making its determination, the Medical Board relied on credible medical evidence, such as a detailed history of petitioner's injuries and medical and psychological treatment, petitioner's applications and interviews and examinations of petitioner. Moreover, the Medical Board relied on numerous reports, including the comprehensive report prepared by Dr. Bochicchio in which she determined that petitioner suffers from depression and anxiety. Specifically, the Medical Board rationally relied on that part of Dr. Bochicchio's report which stated that "[o]n the basis of observations, collateral information, and psychological testing, it is [her] opinion that [petitioner's] presentation can to a large extent be explained by a somatoform disorder, in which he continues to have physical problems that are in excess of what medical testing indicates." Furthermore, Dr. Bochicchio noted that petitioner was referred to the Psychological Evaluation Section ("PES") due to

“persistent physical symptoms, mood irritability and social isolation following [petitioner’s LOD injury], despite the fact that district surgeons noted there were no objective medical findings to account for these symptoms.”

The Medical Board also rationally relied on the fact that nowhere in Dr. Bochicchio’s report did she conclude that petitioner’s psychological condition was caused by the June 2004 LOD incident. Moreover, although Dr. Bochicchio noted that soon after the June 7, 2004 LOD incident, petitioner began to experience headaches, dizziness and vertigo, despite these complaints, petitioner’s district surgeon, as well as Nicholas Tsirilakis, M.D., an NYPD staff surgeon, found that there were “no objective medical findings to explain [petitioner’s] symptoms” and that the June 2004 LOD incident could not be an explanation. Further, the Medical Board reviewed a letter from M. Roy Kremberg, M.D., petitioner’s psychiatrist, dated January 25, 2007, which indicated that petitioner suffers from recurrent major depression but which did not state the cause of petitioner’s depression and did not mention the June 2004 LOD incident.

Finally, the court notes that although Dr. Robins put forth in his report that petitioner suffers from Axis I 311 Trauma-induced Depressive Disorder NOS as a result of the 2004 LOD incident, there was a rational basis for the Medical Board’s rejection of Dr. Robins’ opinion. The Medical Board found that “the code [DSM IV] 311, depressive disorder, [on which Dr. Robins relies] does not encompass the etiology of trauma,” and thus, petitioner cannot be suffering from trauma-induced depressive disorder caused from the June 2007 LOD incident. Indeed, the fact that Dr. Robins provided a different conclusion than that reached by the Medical Board does not render the Medical Board’s conclusion arbitrary and capricious. The Medical board has the final

